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HAROLD B. WILLEY, Cl

Supreme Court of the United States

October Term, 1954
No. 290

ANITA HERMAN,

Petitioner,

v.

NORTHWEST AIRLINES, INC., and CAPITAL AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
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JACOB RASSNER,
HARVEY GOLDSTEIN,
On the Brief.

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Supreme Court of the United States

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Anita Herman, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the above entitled action, rendered on May 5, 1955.

Official Report of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 222 F. (2d) 326.

Jurisdiction

The opinion of the court below was filed on May 5, 1955. Judgment thereon was entered in the office of the clerk of the court on May 5, 1955.

Application for an order extending petitioner's time to file a petition for rehearing was denied on June 1, 1955.

Jurisdiction to review this decision is predicated upon Title 28 U. S. C. § 1254(1).[1]

Question Presented

May a private company time bar a damage action for negligence by arbitrarily and gratuitously filing an abbreviated statute of limitations, under the guise of a tariff regulation, depriving a citizen of the constitutional right to a day in court on the merits and thus assume to itself an immunity from suit not enjoyed by other private industry under similar circumstances.

[An airline, required to file a tariff dealing with technical operation, filed what purported to be a clause, time barring personal injury actions not commenced within one year after the date of accident.]

Statutes and Regulations Involved

Constitution of the United States, Article I, Section 1.[2]

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[1] Title 28 U. S. C. § 1254(1)

§ 1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

[2] CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. . . .

Constitution of the United States, Article I, § 1, Article II, § 1, Article III, § 1.[3]

Title 49 U. S. C. § 642 (a), (d) and (g).[4]

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[3] CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. . . .

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. . . .

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

[4] 49 U. S. C. § 642(a), (d) and (g):

"(a) Any person may file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Board to investigate the matters complained of. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.'

"(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum

(continued on following page)

Constitution of the United States, Amendment V.[5]

(continued from preceding page)

and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: Provided, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

"(g) Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: Provided, That this subsection shall not apply to any initial tariff filed by any air carrier."

[5] Constitution of the United States, Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Passenger Rules Tariff, General Rules 5. Claims.[6]

Title 49 U. S. C. § 483 (a).[7]

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[6] Local and Joint Passenger Rules Tariff No.—PR-1, C. A. B. No. 4, issued by M. F. Redfern, effective July 1, 1945: General Rules 5. Claims.

5. Claims

I. No action shall be maintained for loss or damage to the property or baggage of a passenger or for injury to his person, or for any delay in transportation unless notice of the claim is presented in writing to the general offices of the participating carrier on whose lines the loss, damage, injury or delay occurred within 30 days after the occurrence of the loss, damage, injury or delay, and unless the action is actually commenced within one year after such occurrence.

[7] Sec. 483. *Tariffs of air carriers*

(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; *and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations.* Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate. (Italics ours.)

Constitution of the United States, Amendment X.[8]

Title 14 C. F. R. § 221.[9]

Statement of Facts

The petitioner is a young widow and the mother of two infant children who was denied her rights as an American citizen to a day in court on the merits of her claim.

Petitioner, as a passenger for hire, purchased passage for a flight from Cleveland, Ohio to Seattle, Washington through the office of respondent, Capital Airlines, Inc. Said flight was made on May 4, 1947.

Petitioner was flown from Cleveland to Chicago, Illinois in an airplane owned, operated and controlled by respond-

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[8] CONSTITUTION OF THE UNITED STATES, AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[9] 14 C. F. R. § 221

Part 221—Construction, Publication, Filing and Posting of Tariffs of Air Carriers and Foreign Air Carriers (revised)

* * *

Subpart D—Contents of Tariff

* * *

221.38—Rules and Regulations

* * *

(h) *Personal liability rules.* No provision of the Board's regulations issued under this part or elsewhere shall be construed to require on or after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms (p. 509 of Cumulative Pocket Supplement).

ent, Capital Airlines, Inc., then transferred to an airplane owned, operated and controlled by respondent, Northwest Airlines, Inc., for the remainder of the flight from Chicago to Seattle.

During this latter flight, petitioner was negligently jolted out of her seat causing her to strike her head about part of the airplane structure and suffered severe and permanent injuries.

Suffering continuous pain, petitioner was admitted to the Misericordia Hospital, New York City, on July 6, 1948, for observation and treatment and was informed by the medical authorities that she had suffered and was suffering from a fractured skull and other serious and permanent organic brain damage, all causally related to the accident aforementioned.

A summons and complaint was filed against the respondents on October 28, 1948, some eighteen months after the accident but less than three months from the date of discharge from said hospital.

An answer on behalf of Northwest Airlines, Inc. was served on petitioner on or about February 17, 1949.

Petitioner served an amended complaint on both respondents on November 28, 1950. Answers were served on their behalf on March 20, 1951.

A motion for summary judgment, on the ground that petitioner had neither filed any claim within thirty days nor instituted legal action within one year after the accident, as required by a clause in a tariff filed by respondents with the Civil Aeronautics Board and Air Transport Board, was granted by the United States District Court for the Southern District of New York. The opinion of the district court, in favor of the respondents, was based on the ground that the action was not timely commenced.

As such, petitioner's complaint was summarily dismissed, on motion, without trial, on the basis of a statute of limitations arbitrarily set up by a private company under the guise of a tariff regulation.

The court below affirmed the trial court decision on the ground that the tariff filed with the Civil Aeronautics Board was deemed valid until declared invalid by the Board and, validity not having been determined, said tariff was valid.

Basis of Jurisdiction of the United States District Court for the Southern District of New York

The jurisdiction of the United States District Court for the Southern District of New York was invoked on the ground of diversity of citizenship.[10]

Reasons Relied on for the Allowance of the Writ

Capital Airlines, Inc. and Northwest Airlines, Inc. filed a passenger rules tariff, pursuant to the Civil Aeronautics Act of 1938, 49 U. S. C. § 483(a), and therein inserted a clause, which it claims is legally effective, purporting to establish a statute of limitations limiting the time within which personal injury actions might be brought against it. The courts below have given effect to such claim. The Supreme Court of the United States should review the question whether such claim, and the recognition of such claim in any such case by the courts below, does not offend Article I, Section 1, of the Constitution of the United States, conferring upon the Congress exclusive powers to enact law.

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[10] Plaintiff is a resident of the State of New Jersey. Both defendant airlines were authorized to and were doing business in the State of New York with offices in the Borough of Manhattan, City and State of New York.

POINT I

The arbitrary filing by an airline of a statute of limitations clause in a tariff regulation, filed with the Civil Aeronautics Board, is an unconstitutional invasion by a private party of the powers accorded to the legislative branch of Government under the Constitution of the United States.[11]

Primary jurisdiction to determine the effect of tariff regulations filed with the Civil Aeronautics Board rests with the Board pursuant to the Civil Aeronautics Act of 1938.[12]

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[11] See footnote 2.

[12] Title 49 U. S. C. § 401 *et seq.*

6. The law is now well settled that a tariff fixed by a carrier has no legal effect and cannot be considered as the basis of lessening a statutory period of limitation.

On May 1, 1953, the Civil Aeronautics Board, by order Serial #E-3183, in an order of dismissal, concluded an investigation to determine the lawfulness of many of the liability rules in various tariffs, including personal injury and death claims. During the investigation, stipulations were entered into between the Bureau Counsel and the carriers, including Northwest Airlines, Inc., which, among other agreements not pertinent in the instant matter, cancelled and eliminated the two rules concerning personal injury claims.

On January 25, 1954, the Civil Aeronautics Board, extending the *Battista* decision, adopted an amendment, as a matter of interpretation, of its economic regulations (Part 221 of the Economic Regulations (14 C. F. R. 221)), to the effect that its regulations will not require the filing (and if filed will be disregarded) by air carriers, of tariff disability rules for personal injury and death in the public interest and in order to advance the "uniformity of rules regulating the bringing of suits for personal injury and death within the local jurisdiction governing the claim." It was the Board's considered opinion that such limitations are "traps for the unwary" and improper; that the law of the local jurisdiction should govern, to the exclusion of the federal government.

Order No. E-8060, adopted January 25, 1954, pursuant to the above amendment to the Civil Aeronautics Board Regulation, further stated as follows:

"If and when it becomes necessary to make such determination, as for example in a situation like the *Battista* matter, the Board will institute an appropriate proceeding to deal with the matter."

The assumption and exercise of jurisdiction by the trial court in determining the effect of tariff regulations filed with the Civil Aeronautics Board is a usurpation of the power of the legislative branch of Government, in direct violation of the fundamental policy of separation of powers as enunciated in the Constitution of the United States.[13]

The Civil Aeronautics Board has the primary jurisdiction to determine and prescribe the lawfulness and reasonableness of an arbitrarily filed airline tariff.[14]

The court below erred in sustaining the decision of the district court which had the duty to refer the matter to

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[13] See footnote 3.

[14] See footnote 4.

The case of *Lichten* v. *Eastern Airlines Inc.* (2nd Cir.), 189 F. (2d) 939 (May 22, 1951), an action based on loss of plaintiff's personal property by the defendant airline, held that the Civil Aeronautics Board was empowered either by a complaint or by its own initiative, to determine the lawfulness and reasonableness of a filed tariff of any airline.

Civil Aeronautics Board v. *Modern Air Transport Inc.* (2nd Cir.), 179 F. (2d) 622, was an action by the Civil Aeronautics Board attacking the *lawfulness* of defendant's letter of registration as an irregular Air Carrier, distinguished from the present case wherein the question is one of *reasonableness* of defendant's filed tariff. Held that though the doctrine of primary jurisdiction was not applicable where the issue was one of violation of a rule, it would apply where the question was one of reasonableness.

> "Under this doctrine * * * (primary jurisdiction) * * * the courts will not determine a question within the jurisdiction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. 42 Am. Jur. 698-702. This self-denying doctrine has been used by the courts as a ground for refusing to decide the difficult issues of reasonablness of a rate or

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the Civil Aeronautics Board for determination. Failure to refer the matter was in direct contravention of the fundamental constitutional doctrine of separation of powers.

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> fairness of a regulation which fall within the area of special competence of the particular administrative agency and for which the agency is said to have primary jurisdiction * * *
>
> Thus the outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies. McAllister, Statutory Roads to Review of Federal Administrative Orders, 28 Calif. L. Rev. 129, 143, 147; 30 Geo. L. J. 545; 42 Am. Jur. 700" (pp. 624-625) (parenthesis ours).

In the case of *Trans-Pacific Airlines, Ltd.* v. *Hawaiian Airlines, Ltd.* (9th Cir.), 174 F. (2d) 63, an action to enjoin violations of the Civil Aeronautics Act of 1938, Section 401(a), 49 U. S. C. Section 481(a), the Court stated that where the administrative agency has both legislative and administrative power (as does the Civil Aeronautics Board) the doctrine of primary jurisdiction would apply.

> "* * * prior to judicial intervention, problems which involve expert knowledge or multitudinous detail of intricate nature in a technical field require that recourse should be had to administrative bodies. Especially is this true where uniformity of interpretation of rules and consistency in application, in view of an overall policy, is compelled by the legislative mandate. Then is there not only a commitment of primary, but likewise of *exclusive jurisdiction* to the administrative, and exhaustion of the remedies is mandatory" (p. 66) (emphasis ours).

American Airlines, Inc. v. *Standard Airlines, Inc.*, 80 F. Supp. 135, was a motion to enjoin defendant, *pendente lite*, from holding out to the public that it was operating flights as a common carrier. The Civil Aeronautics Board appeared, *amicus curiae*. The court held that the Civil Aeronautics Board had the authority to establish classifications of air carriers, that it was the proper party in interest, that jurisdiction to make such determination is initially in the board.

> "Reading the various relevant portions of the Act and of Section 292.1 of the Economic Regulation, and taking into account the

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Petitioner submits that the correct and proper procedure was summarized by Judge Delehant in the case of

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> public policy behind them, I conclude that it was not intended that the Courts should, in the first instance, undertake to determine whether or not one who holds a letter of Registration as an Irregular Air Carrier, duly issued by the Board and still in effect, has forfeited the right to operate as such. I can conceive of serious chaos and conflict with the Board if the Courts were to do so. Taking all of these provisions together, I am of the opinion that the question involves matters of public interest in the domain of air transportation—a subject on which the Board is 'the final arbiter' (United Air Lines v. Civil Aeronautics Board, 81 U. S. App. D. C. 89, 155 F. 2d 169, 173), and that jurisdiction to make such a determination and decision is, at least initially, in the Board. See Adler v. Chicago & Southern Air Lines, Inc., D. C., 41 F. Supp. 366, and cases there cited" (pp. 139, 140).

The *United States Navigation Co., Inc.* v. *Cunard Steamship Co. Ltd.*, 52 S. Ct. 247, 284 U. S. 474, affirming the Circuit Court of Appeals, Second Circuit, 50 F. (2d) 83, held that resort must be had to the administrative agency for the purpose of uniformity where the inquiry is essentially one of fact and of discretion in technical matters.

The opinion of the Circuit Court of Appeals, which the Supreme Court of the United States stated to be ably and carefully drawn, declared on pages 86 and 87 as follows:

> "It is said that remedies afforded by the Interstate Commerce Act have been held exclusive only where administrative questions have been involved. But the tendency to extend the requirement of a preliminary inquiry by the Commission is significant.
>
> In the pioneer case of Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, it was held that the right of a shipper to recover a rate alleged to be discriminatory must first be submitted to the Interstate Commerce Commission. Robinson v. Balt. & Ohio. R. R.,

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222 U. S. 506, 32 S. Ct. 114, 56 L. Ed., 288, and Mitchell Coal Company v. Penna. R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; were to the same effect. In Balt. & Ohio R. R. v. Pitcairn Coal Co., 215 U. S. 481, 30 S. Ct. 164, 54 L. Ed. 292 Morrisdale Coal Co. v. Penna. R. R., 230 U. S. 304, 33 S. Ct. 938, 57 L. Ed. 1494, and Midland Valley R. R. v. Barkley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664, the question involved was whether a distribution of coal cars to shippers was discriminatory. It was held that the matter involved preliminary action by the Interstate Commerce Commission, in the absence of which the federal courts had no jurisdiction. Similarly in Tex. & Pac. Ry. Co. v. American Tie Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, the question whether a tariff established by the Commission covered a certain product was held to require the preliminary determination of the Commission. In Northern Pac. Ry. Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221, the reasonableness of a practice of routing shipments was held to involve preliminary administrative determination. In Western & Atlantic v. Public Service Comm., 267 U. S. 493, 45 S. Ct. 409, 69 L. Ed. 753, a bill which was filed to enjoin a state commission from enforcing an order directing a railroad to maintain service on an industrial switch track was dismissed because the question was one which must first be presented to the Interstate Commerce Commission. In Board v. Great Northern Ry., 281 U. S. 412, 50 S. Ct. 391, 74 L. Ed. 936, it was held that the question whether intrastate railroad rates ordered by state authority should be set aside as working unreasonable discrimination against interstate commerce must be determined in the first instance by the Interstate Commerce Commission, and a suit to enjoin a state commission from enforcing an order as to such rates was dismissed."

In discussing the case of *Board* v. *Great Northern R. R. Co.*, 50 S. Ct. 391, 281 U. S. 412, the Circuit Court further held:

"It seems evident that the Supreme Court, after first holding in the Abilene Case, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553,

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9 Ann. Cas. 1075, that prior resort to the Commission must be had where uniformity of rates is affected by the decision of a question of fact, has proceeded far beyond the natural limitations of such a doctrine, and has, in general, insisted upon prior resort to the Commission wherever complicated questions of fact will arise and experience in technical matters is required."

The Supreme Court, in its opinion, concluded on page 249 as follows:

"Such resort, it was said, must be had where a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases, the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the Commission. Preliminary resort to the Commission 'is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

See also:

Robinson v. *Baltimore & Ohio R. R. Co.*, 32 S. Ct. 114, 222 U. S. 506;

S. S. W., Inc. v. *Air Transport Ass'n of America*, 191 F. (2d) 658.

517.[15] The duty of the district court herein was to refer this matter to the duly authorized Civil Aeronautics Board

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[15] Relief, which petitioner herein requests, was denied on other grounds, the Court distinguishing those cases which are in point herein and the facts in the *Schwartzman* case. The Court stated on pages 519 to 522 inclusive, as follows:

> "But the primary jurisdiction rule is not loose or ill defined. Before it may be allowed to oust, or suspend the exercise of, judicial determination in a particular case, it must appear that the solution of the case depends upon the answer to an issue whose determination is by statute committed to an administrative body. The cases in which it has been applied illustrate that limitation upon it. The proper length of this memorandum forbids the copious quotation from any of these cases or even a reference to all of them; but pointed notations to the essential settings of some of them are in order.
>
> The rule had its origin in Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. That action was brought in a state court of Texas by a shipper against a carrier to recover judgment for an amount by which rates charged by the defendant in accordance with its published tariff exceeded the amount alleged by the plaintiff shipper to be reasonable for such service. The supreme court denied the trial court's jurisdiction, and also directed attention to the commission's power under the statute to award reparation to shippers for improper exactions made by carriers before its corrective orders, a power which the Civil Aeronautics Board does not possess, though that circumstance is of no significance in this instance. Baltimore & Ohio R. Co. v. United States ex rel Pitcairn Coal Co., 215 U. S. 481, 30 S. Ct. 164, 54 L. Ed. 292, was a suit in which a shipper sought by judicial mandate, without previous resort to the Interstate Commerce Commission, to compel a railroad to abandon a published plan for the distribution to competing shippers of coal carrying cars in periods of car shortage, and to follow a course which the plaintiff alleged to be nondiscriminatory, just and equitable. Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280, is not procedurally in point, for it was a direct proceeding to review and set aside an order of the commission. In Robinson v. Baltimore

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& Ohio R. Co., 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288, a shipper sued in a state court to recover an alleged discriminatory excess in charges for the transportation of coal, according to a filed schedule of rates, neither approved nor disallowed by the Interstate Commerce Commission up to the time of the filing of the suit, the discrimination allegedly arising out of the exaction of a higher rate for coal loaded in one manner than in another. See also Midland Valley Railroad Company v. Barkley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664. United States v. Pacific & Arctic R. & Nav. Co., 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742, a criminal case, was partially concerned with the validity of certain counts in an indictment charging violation of the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq. by certain discriminatory and conspiratory acts and practices. But its discussion of the necessity of preliminary reference to the commission, while undoubtedly valid, is rendered dubiously instructive by its final indecisiveness and the form of its order remanding the case for further study of the indictment by the trial court. Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472, was brought by a shipper to recover damages said to have arisen out of overcharges to the plaintiff resulting from rebates of parts of freight charges, granted to the plaintiff's competitors by a railroad through the device of allowing, in varying amounts, service charges incident to bringing coal from their mines to its cars. The payment of such service charges not being necessarily invalid, and their validity or invalidity resting upon their appropriateness to the service rendered, and a presumption of validity obtaining until invalidity should be determined by the commission, the trial court was required by the supreme court to hold the exercise of its jurisdiction in abeyance until that question should be referred to and determined by the commission. (See also the express distinction of that case from Pennsylvania R. Co. v. International Coal Co., noted below). Morrisdale Coal Company v. Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 938, 57 L. Ed. 1494 was a suit for damages against a railroad by reason of the defendant's alleged unfair allocation during a season of car shortages of coal cars in pursuance of a rule of distribution promulgated and followed by the railroad, but alleged in the complaint to be

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unjust and inequitable. Northern Pacific Railway Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221 was a suit originally brought in a Minnesota state court by a shipper to recover from a railroad the excess in charges resulting from the latter's practise in routing shipments, in the absence of explicit shipping orders, over what ultimately developed to be the more expensive of two alternate routes. Director General of Railroads v. Viscose Co., 254 U. S. 498, 41 S. Ct. 151, 65 L. Ed. 372, was a suit in which an extensive shipper resorted without previous recourse to, or action by, the Interstate Commerce Commission to a federal court by way of injunction to prevent the operation by a railroad of an amendment or supplement duly filed with the commission to a published tariff whereby a commodity reclassification to the plaintiff's disadvantage was proposed.

In Terminal R. Association v. United States, 266 U. S. 17, 45 S. Ct. 5, 69 L. Ed. 150, after a decree under the Sherman Law, 15 U. S. C. A. Secs. 1-7 15 note, in favor of the United States against sundry transportation instrumentalities, certain of the defendants by civil contempt proceedings sought to enforce rights in the way of the division of joint rates for terminal and transportation services, to which, they conceived, they were entitled under the original decree, but in respect of which no recourse had been had to the Interstate Commerce Commission. In Western and Atlantic Railroad v. Georgia Public Service Commission, 267 U. S. 493, 45 S. Ct. 409, 69 L. Ed. 753, a railroad company sought, without proceeding in the Interstate Commerce Commission, to obtain in a federal court an injunction against the enforcement of an order of the state commission requiring its maintenance of switching service at an industrial siding, upon the ground that the order was discriminatorily burdensome on interstate commerce. Similarly, in Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co., 281 U. S. 412, 50 S. Ct. 391, 74 L. Ed. 936, the complainant carriers, without action before the Interstate Commerce Commission, sought injunction relief in the federal courts against the effectiveness of North Dakota intrastate rates fixed by state authority upon the ground of their discrimination against interstate commerce. In Texas & Pacific Railway Co. v. American Tie and Timber Co., 254 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, a shipper sued to recover damages for a railroad

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company's refusal to accept for shipment in interstate commerce oak railroad crossties at rates prescribed in the railroad's regular lumber tariff, which the carrier contended did not cover ties for which it had no filed tariff under which it could accept ties for shipment. In Loomis v. Lehigh Valley Railroad Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517, a shipper of grain, without preliminary resort to the Interstate Commerce Commission, sued a railroad company for the cost to the shipper of its construction of temporary doors or bulkheads, adequate to enable ordinary freight cars furnished by the railroads, in the place of specially equipped grain cars, to carry grain, an element which obviously enters into ratemaking. United States Navigation Co. v. Cunard Steamship Co., 254 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408, involved a private civil suit under the Sherman and Clayton Acts, 15 U. S. C. A. Sec. 12 et seq., by one water carrier against sundry others involving claims of conspiracy and discrimination in many respects, including facilities, rates, rebates and other factors committed by the Shipping Act to the Shipping Board. In Moore v. New York Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370, the plaintiff joined with a civil demand for injunction relief under the Sherman Law which properly invoked the jurisdiction of a federal district court certain averments of unfair competitive methods, which, on appeal, the supreme court held to be primarily cognizable by the Federal Trade Commission, rather than by the court. Jurisdiction of the court, however, was sustained because of the Sherman Law charges. Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638, denied the power of a federal court to intercept by injunctive order the holding of a hearing by the National Labor Relations Board upon charge of union domination by an employer, a subject entrusted to the board by the National Labor Relations Act, 29 U. S. C. A. sec. 151 et seq.

In the cases cited in the foregoing paragraph, as well as in many others, the court recognized and applied the rule of primary jurisdiction for which the defendant contends upon the submission of its present motion. On some occasions the rule completely thwarted the assertion of the trial court's jurisdiction; on others it postponed its exercise pending administrative determination of a factor vital to decision. But it will be obvious

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for determination,[16] its jurisdiction to be held in abeyance until such time as the aforesaid administrative agency had determined the issue of force and effect of the filed time limitation clause in its tariff. Failure to so refer the matter appears to be clearly erroneous. Barring petitioner's cause as a matter of law seems to be an undue invasion by the district court in the field of legislation and legislative authority, in direct contravention of the doctrine of separation of powers, clearly enunciated in the Constitution of the United States. The court below was in error in sustaining the summary action of the district court in dismissing the complaint as a matter of law.

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from the necessarily meagre references just made to their factual settings and vital issues that in each instance the matter necessarily controlling the decision to which the trial court was invited was one which was by law committed to the primary arbitrament of a commission or board. Generally, the presence and significance of such matter were made to appear in the original complaint or petition; but, on some occasions, it was not introduced until the filing of responsive pleadings. However, and whenever pleaded, its halting consequence was uniform" (pp. 519-522).

[16] See footnote 4.

POINT II

The inclusion of a privately filed, arbitrary time limitation for commencement of a personal injury clause, less than the statutory period, is a denial of petitioner's right to due process of law as enunciated in the Fifth Amendment of the Constitution of the United States.[17]

Legislative delegation of authority to the Civil Aeronautics Board does not permit the Board to accept a time limitation for commencement of an action for damages for personal injuries of any lesser period than that enacted by the legislatures of the individual states.

As such, the arbitrary filing of respondents' *Passenger Rules Tariff, General Rules 5, Claims*[18] clause was not binding upon the petitioner in view of the fact that it was not required to be filed pursuant to the Civil Aeronautics Act of 1938, 49 U. S. C. § 483(a).[19]

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[17] See footnote 5.

[18] See footnote 6.

[19] See footnote 7.

In the hearing of *Continental Charters, Inc.—Complaint of Mary Battista,* Docket No. 5573 (unofficially reported in Commerce Clearing House Inc., Aviation Law Reporter, Volume 1A, Title IV, paragraph 21, 562, page 16, 650). (Order denying reconsideration, paragraph 21, 595, page 16, 731), an injured passenger was held not bound by the inclusion of the unjust, unreasonable, unjustly discriminatory and therefore unlawful Tariff Rule, filed under the guise and pretense of complying with required filing of Tariff Rules with the Civil Aeronautics Board, as never contemplated by the applicable Act of Congress, 49 U. S. C. § 483(a) or regulations promulgated thereunder.

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Citing the *Shortley* and *Thomas* cases (footnote 4), the case of *Toman* v. *Mid-Continent Airlines, Inc.*, 107 F. Supp.

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In the case of *Thomas* v. *American Airlines, Inc.*, 104 F. Supp. 650, Chief Judge Trimble of the Eastern District of Arkansas, denying defendant's motion for summary judgment, stated:

> "The limitation period for giving notice and bringing suit in the tariffs of a common carrier are binding upon the passengers only if there is statutory authority for filing such tariff, that is, the statute controlling *requires* its filing. Southern Pacific Co. v. United States, 272 U. S. 445, 47 S. Ct. 123, 71 L. Ed. 343. Even the carrier itself is not bound by such a tariff not so authorized. Thompson v. Chicago, B. & Q. R. R. Co., 157 I. C. C. 775. The Civil Aeronautics Act of 1938, 49 U. S. C. A. Section 401 et seq., sets forth the provisions relating to the filing of tariffs and does not require or authorize by implication the filing of tariffs limiting in any way the liability of the carrier for its own negligence for personal injury to the passenger.
>
> Pacific Steamship Company v. Cackette, 9 Cir., 8 F. 2d 259, is on all fours with the case at bar, and sustains plaintiff's contention. In this case the U. S. Supreme Court denied certiorari. 269 U. S. 586, 46 S. Ct. 203, 70 L. Ed. 426" (pp. 650-651). (Italics ours.)

The case of *Shortley* v. *Northwestern Airlines*, 104 F. Supp. 152, held that the inclusion of the provision limiting plaintiff's time to give notice and commence action was not required to be filed with the Civil Aeronautics Board by the defendant airline; that plaintiff was not bound by the stated provisions.

> "The first question which must be answered is, does the inclusion of this provision in the tariff, filed by the defendant, operate as a matter of law to preclude the plaintiff from maintaining an action within the period fixed by law as a statute of limitations, but in the absence of the ninety-day notice and beyond the one-year period stated in the tariff provision? The answer is that it does not * * * (p. 155).
>
> As to whether or not the obligation of the carrier was modified by contractual agreement, as to which the male plaintiff had either actual knowledge or such reasonable notice as to be equated to actual knowledge, is a question of fact to be determined under

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345, Reeves, Chief Judge, stating the opinion of the court, held that the limitation period for giving notice and bringing suit in the tariffs of a common carrier was binding upon passengers only if there was statutory authority for filing such tariff—if the statute controlling *required* its filing.[20]

Crowell v. *Eastern Air Line, Inc.*, April 2, 1954, unofficially reported in the Commerce Clearing House, Inc., Volume 2, page 17,314, held that the tariff rules pertaining to time limitation, since not required to be filed by Civil Aeronautics Board Regulations, were not binding upon an injured person.[21]

(continued from preceding page)

appropriate pleadings by the trier of the facts. The same is so with respect to any question of fact as to waiver or estoppel. While these doctrines are ordinarily not applicable to a common carrier with respect to a departure from published tariffs, they are not inapplicable where such common carrier seeks to exonerate itself of liability by reason of a tariff provision which it is neither authorized nor required to file by the applicable Act of Congress, or regulations promulgated thereunder" (p. 156).

[20] The Court stated that *Wilhelmy* v. *Northwest Airlines*, 86 F. Supp. 565, which held a claim time barred, has not been followed.

[21] See also:

Bernard v. *United States Air Coach*, 117 F. Supp. 134;

The George Washington Law Review, Volume 18, *Airline Tariff Provisions as a Bar to Action for Personal Injuries*, By Thomas C. McKay, page 160, treating this entire issue.

POINT III

The inclusion of a time limitations tariff clause, filed by an airline, is an unconstitutional invasion of the powers of the individual state legislatures and unconstitutional as against the fundamental principles of the doctrine of delegated and reserved powers under the Tenth Amendment of the Constitution of the United States.[22]

The doctrine of separation of powers of the judiciary and legislature applies to legislative delegated authority to an administrative agency to make determinations of a quasi-legislative nature.

The validation of the court below of an arbitrarily filed private tariff regulation abbreviating petitioner's statutory right of instituting an action for damages for personal injury within the period enacted by the state legislature is unconstitutional as against the fundamental principles of the doctrines of separation of powers,[23] and of delegated and reserved powers.[24]

The court below erred in holding that respondents' filed tariff, limiting petitioner's right to institute her action for personal injuries was valid until determined invalid by the Civil Aeronautics Board as this adjudication would appear to be an unconstitutional abuse by the judiciary of the

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[22] See footnote 8.

[23] See footnote 3.

[24] See footnote 8.

powers granted by the Constitution of the United States to the legislature,[25] which provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States." Article I, Section 1.

The law is now well settled that a tariff fixed by a carrier has no legal effect and cannot be considered as the basis for the lessening of a statutory period of limitation.

The Civil Aeronautics Board itself amended its regulations to the effect that such tariff rule, as was filed by the respondents herein, is unlawful.[26]

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[25] In the case of *Ex parte United States*, 242 U. S. 27, a petition for a writ of mandamus, this Court held that a federal court, having no statutory authority so to do had no power to order the indefinite suspension of the execution of a sentence of imprisonment enforced by it. The Court held that the "authority to defend the parliament procedure is legislative and beyond the scope of the judiciary to "permanently refuse to enforce a law . . ." and would "result in the destruction of the conceded powers of the other department and hence leave no law to be enforced."

In the case of *Calder* v. *Bull*, 3 U. S. 388, this Court held it to be beyond the power of the judiciary to pronounce a law void when enacted by the legislature within the general scope of its constitutional power.

See also:

Douglas v. *City of Jeanette*, 319 U. S. 157;
Rejsenhoff v. *Colonial Navig. Co.*, 35 F. Supp. 577.

[26] See footnote 9.

On May 1, 1953, the Civil Aeronautics Board, by order Serial #E-3183, in an order of dismissal, concluded an investigation to determine the lawfulness of many of the liability rules in various tariffs, including personal injury and death claims. During the investigation, stipulations were entered into between the Bureau Counsel and the carriers, including Northwest Airlines, Inc., which, among other

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Thus, the time limitation clause was of no effect, *ab initio*, as an unconstitutional usurpation by the federal administrative agency of a reserved power of the individual states under the Tenth Amendment of the Constitution of the United States.

The legislative enactments of state statutes of limitations having been declared by this Court, *Calder* v. *Bull*, *supra*, to be within the reserved power of the individual states under the Tenth Amendment of the Constitution of the United States, it would appear that no delegation of such states' rights could be effected by the federal legislature to an administrative agency, that said agency not having such power to enact, could not accept that which was beyond its scope of function.

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agreements not pertinent in the instant matter, cancelled and eliminated the rules concerning personal injury claims.

On January 25, 1954, the Civil Aeronautics Board adopted an amendment, as a matter of interpretation, of its economic regulations (Part 221 of the Economic Regulations [14 C. F. R. 221]), to the effect that its regulations will not require the filing (and if filed will be disregarded) by air carriers, of tariff disability rules for personal injury and death in the public interest and in order to advance the "uniformity of rules regulating the bringing of suits for personal injury and death within the local jurisdiction governing the claim." It was the Board's considered opinion that such limitations are "traps for the unwary" and improper; that the law of the local jurisdiction should govern, to the exclusion of the federal government.

Order No. E-8060, adopted January 25, 1954, pursuant to the above amendment to the Civil Aeronautics Board Regulation, further stated as follows:

> "If and when it becomes necessary to make such determination, as for example in a situation like the Battista matter, the Board will institute an appropriate proceeding to deal with the matter."

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

JACOB RASSNER,
HARVEY GOLDSTEIN,
On the Brief.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 152 October Term, 1954

Argued April, 1955 Decided May 5, 1955

Docket No. 23275

ANITA HERMAN,

Appellant,

v.

NORTHWEST AIR LINES INC., and CAPITAL AIRLINES, INC.,

Appellees.

Before: L. HAND, SWAN and HINCKS, Circuit Judges.

On appeal from a judgment of the District Court for the Southern District of New York (Weinfeld, J., presiding), summarily dismissing a complaint in an action to recover for personal injuries suffered by a passenger in an airplane.

HARVEY GOLDSTEIN (JACOB RASSNER on the brief) for the appellant.

EDWARD J. BEHRENS (CHARLES H. LAWSON on the brief) for the appellees.

L. HAND, Circuit Judge.

This is an appeal from a judgment, summarily dismissing the complaint of a passenger for personal injuries suf-

fered in an airplane. The complaint alleged that the plaintiff bought a ticket from Cleveland to Seattle by airplane, and that she was injured while on the leg of the route between Chicago and Seattle in a plane, owned and operated by the Northwest Airlines Inc. She joined as defendant the Capital Airlines, Inc., which issued the ticket; but as it acted only as an agent for the other company, we disregard it. The ticket contained two limitations; one that the passenger must serve notice of any claim for injuries within thirty days, and the other that suit must be brought within one year. The plaintiff complied with neither limitation, but, since we hold that the second was valid, we ignore the first, regardless of the scope that should be given to the decision of the Civil Aeronautics Board in In Re Battista, 1952 U. S. Aviation Reports 471. Northwest Airlines Inc., which we shall speak of as the defendant, was operating under a certificate of public convenience and necessity granted by the Board, and had filed with it a copy of its regulations, one of which, as we have said, provided that the action must be "actually commenced within one year after such occurrence": i. e. after the injury. Judge Weinfeld held that, as the plaintiff had not procured any preliminary ruling of the Board as to the validity of the limitation, she might not challenge it, and that consequently the action was brought too late. Judgment was entered in June, 1951, and neither at the hearing before the judge, nor after the opinion or the judgment was filed, did she ask leave to present to the Board the invalidity of the regulation, so that the only question upon this appeal is whether it was to be deemed valid until the Board declared that it was not.

As to this the plaintiff says, first, that the Board's jurisdiction did not extend to a regulation limiting the time within which an action for personal injuries may be brought, because the statute (§ 483(a) of Title 49), did not

require carriers to file such a regulation with the Board; and its jurisdiction extended only to regulations that had to be filed. To this there are two answers: first, that the jurisdiction of the Board to hear complaints as to the validity of a carrier's regulations is not dependent upon the carrier's duty to file the regulation with the Board; and second, that the statute imposed upon the carrier a duty to file with the Board such a regulation as that at bar. Section 642 of Title 49 defines the Board's jurisdiction; it is entitled, "Complaints to and investigations by Board," and subdivision (g) provides that "whenever any air carrier shall file with the Board a new * * * rate, fare or charge * * * or any * * * regulation * * * affecting such rate, fare or charge, or the value of the service thereunder * * * the Board is empowered * * to enter upon a hearing concerning the lawfulness of such * * regulation." A passenger's action to recover damages for personal injuries, is based upon a claim for the carrier's failure to render the agreed service, and involves "the value of the service," a part of which is the passenger's safe delivery at the agreed destination. The measure of the recovery is the difference between the safe delivery of the passenger and the actual delivery; and a regulation that limits the time within which that claim may be asserted certainly "affects" the value of the recovery: the substitute for the service. Hence § 642(g) gives the Board jurisdiction over such claims, regardless of whether the carrier is under any duty to file the limiting regulation. But, even were it otherwise, § 483(a) does in fact require carriers to file such a regulation; for it covers carriers' regulations "showing, to the extent required by regulations of the Board, all classifications, rules, regulations * * * in connection with * * * air transportation"; and the Board's Regulation § 224.1(e)(7) is in part as follows: "General rules which govern the tariff: i.e. state conditions that in any way affect the rates named in the

tariff or the service under such rates." The reasons we have just given in discussing § 642(g), show that a regulation, limiting the time within which an action based on the negligent carriage of passengers may be brought, "affect" the "service" under prescribed rates and hence they must be filed.

All that remains is whether the carrier's regulation must be deemed valid until the Board declares otherwise; and, as to that, our decision in Lichten v. Eastern Airlines, 189 Fed. (2) 939 is authoritative. Incidentally, it escapes at least two of Judge Frank's criticisms of the majority's ruling in that case; for the regulation there involved, exculpated the carrier from liability for its negligence on the agreed route and also upon a deviation. It is indeed true that a common carrier of passengers is not free to set as short a period as it pleases within which a passenger must sue for damages arising from its negligence—the period must be "reasonable"—but that is a quite different question from whether it may altogether exculpate itself from the consequences of its negligence*; or, indeed, whether it may limit the recovery to less than the actual loss or injury. Both regulations do indeed "affect" the "value of the service"; but it is a far greater limitation of the carrier's responsibilities to allow it to limit its care than to fix a period before the end of which suit must be brought. Assuming for argument that no regulation ought to be allowed to relieve the carrier of its duty, there is every reason for allowing the Board to pass upon the adequacy of the time for suit. Finally, it is irrelevant that after the plaintiff's claim arose, the Board held that all such limitations should be invalid in the future.

Judgment affirmed.

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* Gooch v. Oregon Short Line Ry., 258 U. S. 22.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of May, One Thousand Nine Hundred and fifty-five.

Present:

HON. LEARNED HAND,
HON. THOMAS W. SWAN,
HON. CARROLL C. HINCKS,
Circuit Judges.

ANITA HERMAN,
Plaintiff-Appellant,

v.

CAPITAL AIRLINES, INC., & ANO.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

FILED
SEP 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ..290

ANITA HERMAN,

Petititioner,

v.

NORTHWEST AIRLINES, INC. and
CAPITAL AIRLINES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD J. BEHRENS,
Counsel for Respondents,
70 Pine Street,
New York 5, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

ANITA HERMAN,

Petitioner,

v.

NORTHWEST AIRLINES, INC. and CAPITAL AIRLINES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This case involves a private dispute over the right of Northwest Airlines, Inc. to defend against a claim arising in 1947 on the basis of tariff provisions existing *at that time*. Such provisions are not now, and have not been in effect since May 1, 1953, so far as the respondents are concerned. No similar provisions have been contained in the tariffs of any American air carrier since March 2, 1954. Accordingly, the issue is of no current interest, eight years later, to anyone other than the actual litigants.

The respondents will make a full statement of the case (Rules 24(1) and 40(3) of the Supreme Court of the

United States) to correct inaccuracies, omissions and unfounded assertions contained in the Petition, especially since the assertions in the Petition are unsupported by any references to the printed record as required by Supreme Court Rule 40(e).

On April 20, 1947, well over eight years ago, at Cleveland, Ohio, the petitioner purchased a ticket for transportation by air (Exhibit A, Appendix to Appellant's Brief, p. 19). The ticket was "sold subject to tariff regulations."[1] The ticket, which was sold by Capital Airlines, Inc., covered transportation on Capital's lines from Cleveland to Chicago, Illinois, on May 3, 1947 and a later flight from Chicago, Illinois to Seattle, Washington on the lines of Northwest Airlines, Inc.

On October 28, 1948 (fol. 2)[2] the petitioner served a complaint. She had never reported any alleged in-flight accident (fol. 93) and had never notified either of the companies about this alleged, unwitnessed event at any time before service of the complaint (fol. 120). Indeed, prior to such service, over seventeen months later, neither of the companies had received any information, oral or in writing, from anyone concerning the alleged accidental injury to the petitioner (fols. 126-127, 136).

In the original complaint the petitioner alleged the ticket had been purchased on about May 1, 1948, and the flight occurred on May 6, 1948. A thorough search by Northwest of its voluminous departure control sheets and passenger manifests for all of its flights on the day in question, as well as for a reasonable period before and after, showed that the petitioner was not listed as a pas-

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[1] The petitioner has never questioned that the sale of the ticket "subject to tariff regulations" would normally result in establishing and defining the legal relationship of the parties. *Western Union Telegraph Company* v. *Esteve Bros. & Co.*, 256 U. S. 566.

[2] All folio references are to the Appendix to appellant's Brief in the United States Court of Appeals for the Second Circuit.

senger at or about the time alleged in the complaint (fol. 148). It was not until March 22, 1949, when the petitioner's deposition was taken, almost two years after the alleged episode, that she fixed the date of the alleged occurrence as May 4, 1947 (fols. 78, 81, 90). Thus, the petitioner's admittedly false allegations effectively prevented the respondents from even beginning to investigate her unfounded assertions until almost two years after the alleged event.

The petitioner's claim, as presented in the examination before trial (fols. 73-120), is so vague that it is difficult to state how the alleged accident (if there ever was an accident) occurred. For all purposes in the Courts below, the petitioner's testimony has been taken at face value. According to her, the flight from Cleveland to Chicago on the plane of Capital Airlines, Inc. was, in all respects, routine and nothing untoward then happened (fol. 87). The petitioner said that at some time, which she could not definitely fix, during the flight from Chicago to Seattle, on a plane of Northwest Airlines, Inc., something happened to her. She said that sometime after midnight she fell asleep and "was jolted several times out of my seat; and once I found myself—the small of my back—on the edge of the seat and my head on the arm rest" (fol. 88). She said that she had a bleeding from her mouth and nose and "this terrible twist in the back of my neck" (fol. 89). The stewardess, according to the petitioner, thought that the petitioner's difficulties were due to the altitude and gave her some aspirin (fol. 89). According to the petitioner, neither she nor anyone else had safety belts secured at the time and there were people walking around in the plane (fols. 89, 90), the clearest indication there actually was no turbulence.

As to the time of the event, from which the respondents might ascertain where the plane was at the time of the alleged occurrence, all the petitioner would say was that the alleged event was after midnight (fol. 90), which would

be sometime on May 4, 1947. Another attempt to fix the location of the plane at the time alleged was equally unavailing, because the petitioner said she could not remember whether any stops had been made after the plane left Chicago and before the alleged event (fol. 91). Nor could the petitioner state the name of the hostess (fol. 91), which might help fix the place of the occurrence, since one stewardess did not make the entire flight (fol. 157).

Petitioner, a nurse by profession (fols. 113, 114), did not seek any medical treatment or advice until January 3, 1948 (fol. 101), eight months later. On July 10, 1948, fourteen months later, an X-ray demonstrated a fracture line of the skull (fols. 178-180), but no brain damage could be found (fols. 180-186). The allegation in the petition (p. 7) to the contrary is unsupported by any folio reference. Indeed, the petitioner does not support anything in the "Statement of Facts" by any reference whatever. Apparently, the petitioner's attorney attributes this facture line to some alleged episode aboard the plane (petition, p. 7).

At the time when the ticket was sold, and at the time when the petitioner was transported, there were certain tariff rules (Appendix to appellant's Brief, p. 55) in effect. The rule relating to claims was as follows:

> "5. Claims
>
> I. No action shall be maintained for loss or damage to the property or baggage of a passenger, or for injury to his person, or for any delay in transportation unless notice of the claim is presented in writing to the general offices of the participating carrier on whose lines the loss, damage, injury or delay occurred within 30 days after the occurrence of the loss, damage, injury or delay, and unless the action is actually commenced within one year after such occurrence."

Both of the respondents were operating under Certificates of Public Convenience and Necessity issued by the

Civil Aeronautics Board (fols. 128, 137) and had fully complied with all requirements concerning the filing of their tariffs in accordance with the Economic Regulations of the Civil Aeronautics Board (fols. 194-201, 205-206).

The respondents interposed the tariff defenses in their answers and moved for summary judgment in order to avoid the enormous cost of defending the case on the merits. Since the petitioner could not identify the stewardess, the respondents would require as witnesses the stewardesses on the entire flight from Chicago to Seattle, as well as the pilot and co-pilot and passengers, all for the purpose of showing that the flight was entirely routine and no unusual events occurred. The respondents would also require the records of the radio messages to prove the flight was entirely without unusual event, as well as the System Chief Meteorologist and employees of the U. S. Weather Bureau to demonstrate that thermal turbulence would not cause undue roughness of the air, that the air mass covering the entire route was uniform and that the route flown did not cover rough terrain to an extent where mechanical turbulence would be significant (fols. 157, 158).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the respondents moved for summary judgment, assigning the foregoing tariff provision as a common ground for relief (fols. 118a and 119b). The petitioner tendered no dispute of fact (fols. 204, 205). Additionally, the respondent, Capital Airlines, Inc., submitted affidavits demonstrating that as matter of fact, as well as of tariff rule, it had acted only as a disclosed agent for the passage on Northwest Airlines, Inc. (fols. 124, 133).[3] Here, again, the petitioner did not challenge the allegations. Neither in the District Court nor in the Court of Appeals did she question the propriety of summary judgment in favor of Capital

[3] Under the circumstances Capital would not be liable for any tort committed during transportation by Northwest. *Pennsylvania Railroad Co.* v. *Jones*, 155 U. S. 333, 339.

Airlines, Inc. Nor is there any reference in the petition to indicate why the petitioner continues to involve Capital Airlines, Inc., since one basis for granting it summary judgment has never been and is not now disputed by the petitioner.

In a written opinion dated June 7, 1951, the District Court held the respondents were entitled to a summary dismissal of the complaint on the defense in the answers, that the suit had not been commenced within one year after the alleged occurrence, as required by the tariff (fols. 202-208). There was no decision concerning the tariff requirement for written notice of claim within 30 days (fol. 208). The District Court simply held that under the doctrine of "primary jurisdiction" the provisions of a tariff filed with the Civil Aeronautics Board are deemed valid until the Board rejects the provisions and the "reasonableness" of a tariff can be raised in the courts only after the petitioner had exhausted the administrative remedies provided by the statutes. The District Court relied for its decision upon the cases of *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622, and *Lichten* v. *Eastern Airlines, Inc.*, 189 F. 2d 939. Judgment was entered on June 22, 1951 (fol. 209-211) and the petitioner filed a notice of appeal.

A little less than four years after judgment (eight years after the alleged injury), the petitioner brought the appeal on for argument in the Court of Appeals. Judge Learned Hand, writing for a unanimous Court of Appeals, affirmed the dismissal of the complaint by opinion dated May 5, 1955, and on June 1, 1955, the Court of Appeals for the Second Circuit denied the petitioner's motion for further time to file a petition for rehearing there.

The Court of Appeals said that there was but one problem really before it for decision, and that was whether a tariff was "to be deemed valid until the Board declared it

was not", because at no time had the petitioner ever asked leave to present the question before the Civil Aeronautics Board. The Court held that the petitioner's argument, that the Board's power did not extend to a regulation limiting the time for suit, was groundless on two bases, namely, (1) under the provisions of 49 U. S. C. 642, the Board has power to hear complaints and make investigations of any regulation affecting the value of the service rendered by a carrier—which a limitation of time for suit obviously does—and (2) the Board clearly had jurisdiction of the rule or regulation, since such a regulation was required to be filed pursuant to 49 U. S. C. 483(a) and the Board's regulation, paragraph 224. 1(e)(7). Since the tariff regulation involved here was not one exculpating the carrier from the consequence of its own negligence, or limiting the recovery to anything less than actual loss or injury, the sole question was one of "reasonableness" of the time for suit, and as to that matter the Board had the power of decision.

On August 3, 1955, the pending petition was filed in this Court.

Grounds Why the Cause Should Not Be Reviewed

1. The cause involves a private dispute over the applicability of an air carrier's tariff in 1947, and is without interest to anyone else, since the entire practice was changed by the respondents in 1953, and by all American air carriers in 1954.

2. The alleged constitutional basis for review is feigned.

3. The Court of Appeals for the Second Circuit followed the decisions of this Court in disposing of the cause.

ARGUMENT

The cause presents no constitutional problems and the actual issue is only of hypothetical interest to anyone except the particular litigants.

An extensive discussion of the factors enumerated in Supreme Court Rule 19 is deemed surplus. The full impact of the words written by Mr. Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, appears not to have been diminished by subsequent adjudication. He wrote:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

While the case did contain Constitutional problems, which immediately distinguishes it from the one at Bar, and although the exact problem was the dismissal of a writ as improvidently granted rather than the granting of a writ in the first instance, the opinion of Mr. Justice Frankfurter in *Rice* v. *Sioux City Cemetery*, —— U. S. ——, 99 L. Ed. —— (Advance p. 507) No. 28—October Term, 1954 (Decided May 9, 1955) seems apposite.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for

the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v. vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341."

In the *Rice* case, subsequent statutory enactment would govern any litigation arising in the future under similar circumstances so that the issues actually tendered by the parties to the suit had become of "isolated significance." In the case at Bar, the tariff provision which is its core, has not been effective since May 1, 1953 (C. A. B. Order No. E-7348, Docket No. 4059, *et al.*). Since March 2, 1954, no American air carrier has had any comparable tariff provision and none will be found in future tariffs. (*Matter of the Personal Injury Rules Case,* C. A. B. Docket No. 6149, Order No. E-8060 and Economic Regulations, Part 221 as amended by Regulation ER-195.)

In an effort to arouse the interest of this Court in a stale, unmeritorious claim and a problem of no current interest to anyone else, the petition is saturated with quotations from the Constitution of the United States (Petition, pp. 2, 3, 4, 6) and with general allegations that something, somewhere, somehow, must be "unconstitutional" because the petitioner's case has been lost (*e. g.,* at Petition, pp. 9, 10, 11, 19, 20, 23, 24, 25). The petition speaks glibly of

some constitutional invasion by a private party of powers granted to the legislative branch of the Government; of a similar invasion or usurping by the Judiciary; of general rights to due process of law, and even of State's rights. None of these generalities is supported by the citation or discussion of any authority dealing with the alleged constitutional problems. The petitioner has inverted the usual format of a petition, having made sweeping allegations of constitutional problems in the body of the petition, whereas, in fact, the real problem which is sought to be reviewed is to be found in the footnotes.

Apart from the absence of constitutional authorities in the petition, neither at the District Court level nor before the Court of Appeals was there ever involved any constitutional question. Particularly, no part of the Civil Aeronautics Act of 1938 (49 U. S. C. 401, *et seq.*) was ever challenged. Had the petitioner ever questioned, seriously or not, the constitutionality of the Act, then her attorney would have complied with General Rule 22 of the Eastern and Southern Districts of New York, which requires a party so situated to notify the Chief Judge, in writing, of the existence of the question so that the Court can comply with 28 U. S. C. 2403. It would seem to be the fact that even now the petitioner really challenges nothing on constitutional grounds.

The issue here is not even whether the tariff was valid or reasonable in 1947. The problem presented by the petitioner is only whether the courts below have correctly decided that the tariff was *presumed* reasonable in 1947 under the doctrine of "primary jurisdiction", unless and until the Civil Aeronautics Board adjudged otherwise.

Because of the odd nature of the petition, it should be read against a brief historical background of the Civil Aeronautics Act and what the Civil Aeronautics Board has done under that Act.

The Civil Aeronautics Act of 1938 (49 U. S. C. 483) required air carriers to file tariffs in two different situations. While all of the provisions of the law are mandatory, since they are prefaced with the phrase, "shall file with the Board", Congress gave to the Civil Aeronautics Board certain latitude concerning some parts of tariffs. The statute required that the carriers "shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it and between points served by it and points served by any other air carrier or for an air carrier when through service and through rates shall have been established. * * *"

49 U. S. C. 483 contains further parts of the statutory scheme, in that it also requires that the tariffs filed shall show "to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." By its very terms, the statute contemplated that the tariffs, as filed, would include much more than simply rates, fares and charges. The statute left to the judgment of the Civil Aeronautics Board the extent to which the rules, regulations and practices of the carrier were to be included.

Beginning with the enactment of the statute in 1938, there was a wide-spread practice of air carriers to file with the Civil Aeronautics Board tariffs containing stipulations concerning the time for suit. This was deemed advisable in the absence of a Board adjudication to the contrary (as well as because of definite Board rulings referred to hereinafter), because it is commonplace for flights to encompass many States within a very short period of time and local statutes of limitations vary from place to place. In the case at Bar, the flight covered seven States and, in view of the fact that many State statutes of limitations are tolled by the absence of a prospective defendant, the end result

would be that without some tariff rule or regulation on the subject some suits could be instituted without any practical limitation whatever as to time. In the case of accidents at airports, or crashes, the problem was not complex, but it has been often difficult, if not impossible, to determine in what State an injury of the type alleged here did occur. With an alleged, unreported, in-flight occurrence, where the petitioner can not even fix the time of the occurrence, it is beyond human ability to ascertain what State statute might apply. The end result of looking to a State statute of limitations in a case such as the one at Bar was generally deemed unworkable, and so, for the purpose of putting some end to the time for litigation, American carriers generally filed tariffs containing the time limit, as the respondents did here.

The Civil Aeronautics Board has changed the practice, effective March 2, 1954 (Regulation No. ER-195). Balancing the advantages to the air carriers which would result from a uniform Federal rule concerning the time for suit against the disadvantages to the traveling public and their lawyers, who, according to the Board, are ignorant of tariff regulations and look only to the State laws where the injury has occurred, the Board decided that after March 2, 1954, the matter of time for suit would be left to the law of the State where the event occurs. In short, the Board adopted the view that a different sort of uniformity of rules concerning the bringing of suits for personal injury and death would be best. The uniformity achieved is simply that a passenger of an air carrier will be in exactly the same position as anyone else injured at the place where such injury occurs. Of course, this leaves a carrier in the future without any practical limitation in a case such as the one under consideration, but this is a matter within the discretion of the Civil Aeronautics Board. It has decided the issue, and that is the end of the matter so far as passengers are concerned after March 2, 1954.

Up until 1953, the Civil Aeronautics Board never rejected tariffs with provisions for time for suit and time for notice of claims, although its power in that field is obvious. Under Economic Regulations, Part 221.4, was a requirement for the statement of "general rules which govern the tariff, *i. e.*, state conditions which in any way affect the rates named in the tariff for the service under such rates." So far as an actual requirement by the Board for the filing of such tariff rules, the Board itself has said, in promulgating Regulation No. ER-195, amending Economic Regulations, Part 221 (14 CFR 221): "In view of the practice of the air carriers and the course of administrative dealing with these rules, it cannot be definitely stated that the filing of tariff liability rules has not been required by Board regulations." The importance of the matter may be found partly by referring to 49 U. S. C. 622, which makes the failure by an air carrier to comply with the Regulations of the Board a violation of law.

In December 1951, an aircraft of Continental Charters, Inc. crashed, with resultant death to 26 passengers and injury to 14. This event set in motion a chain of events resulting in various investigations by the Civil Aeronautics Board, culminating in several stipulations in 1953 and amendments of the Economic Regulations in 1954. What has actually transpired in the interim has been erroneously presented in the petition before this Court.

The crash to which reference was made resulted in the presentation to the Civil Aeronautics Board of *Continental Charters, Inc.—Complaint of Mary Battista* (Docket No. 5573, Order Serial No. E-7087). While the injured passengers were in the hospital, various representations were made to them by the president of the carrier and adjusters of the insurance company. After 30 days expired, all of the assurances were withdrawn and the complainants were told that no consideration would be given to their claims because of a rule in the tariff requiring claims to be presented, in

writing, within 30 days after the occurrence of the event giving rise to the claim, which the complainants had not done. Two of the complainants sued in the United States District Court for the Southern District of Florida. The respondent filed a motion to dismiss, based in part on the failure to comply with the notice provision of the tariff. The Court postponed hearings on the motion so that the complainants might seek a finding from the Civil Aeronautics Board "as to the lawfulness of the rule". This delay was at the request of the complainants and pursuant to the doctrine of "primary jurisdiction," which is the doctrine which has been applied in the case at Bar. Thereupon, four surviving passengers and the estate of a deceased passenger filed a complaint with the Board to determine the validity of the tariff rule requiring a 30-day notice of claim.

The Board found that the particular rule for 30 days notice in the *Battista* case under the facts was unreasonable and therefore was ruled invalid. The Board stated that it did not go beyond the facts of the case before it, and certainly nothing was adjudged other than the reasonableness of the requirement for notice of claim.

Thereafter, the Civil Aeronautics Board began an investigation of the entire subject of tariff regulations dealing with notices of claims and time for suit. This investigation was entitled, *"In the Matter of the Personal Injury Rules Case,* Docket No. 6149". The tariff matter presented by the petitioner here was set at rest for the future and the proper scope of the *Battista* decision was enunciated by the Board on January 25, 1954, when it brought the investigation to a close by Order No. E-8060 and simultaneously adopted Regulation No. ER-195. In the latter regulation, the Board amended Part 221 of Economic Regulations, effective March 2, 1954, in the following way:

> "No provision of the Board's regulations, issued under this Part or elsewhere, shall be construed to

require, on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction, except to the extent that such regulation shall do so in express terms."

In Regulation No. ER-195, the Board referred to its adjudication in the *Battista* matter ("without deciding whether such tariff rules were required to be filed") where it had held that a written notification of claim requirement within thirty days after the occurrence was unreasonable. Beyond that, the Board had not gone. Its purpose in amending the Economic Regulations was clearly stated in the following way:

> "The purpose of the regulation hereby adopted is to make it absolutely clear that from and after the effective date of this amendment, the Board's regulations will not require the filing of such tariff rules. In so doing, the Board is not passing upon the reasonableness of any such rule, nor of the legality of any such practice. Neither is this regulation an interpretation of the Board's earlier regulations, and any rights which have accrued prior to the effective date hereof will be governed by the law and regulations as they existed prior to the effective date hereof."

In Order No. E-8060, the Board said that the issues in the proceeding were whether the Civil Aeronautics Act or the Board's regulations in effect up to that time required the filing of tariff rules limiting an air carrier's liability for personal injury or death, and if so, whether such rules as were involved in that proceeding were reasonable and lawful. The Board pointed out that there was no party in that proceeding who was in need of a determination whether the tariff rules were ineffective as to him as of a

certain time in the past. Thereby the Board distinguished the *Battista* situation. The Board pointed out that the need for any determination of that character in the future had been obviated by Regulation No. ER-195. The Board said: "It should be made clear that the determination of this investigation does not involve any findings as to the fileability or the reasonableness of the tariff rules in issue under the Act and our Economic Regulations prior to the effective date of Amendment No. 1 to Part 221. If and when it becomes necessary to make such determinations, as for example in a situation like the *Battista* case, the Board will institute an appropriate proceeding to deal with the matter."

Neither by its determination in the *Battista* matter, nor by its investigations, nor by any stipulation, has there been any adjudication by the Board that the tariff regulation for suit within one year was in any way unreasonable or unlawful. What occurred years later in connection with the prospective operation of tariffs of this type serves merely to accent the age of the pending case. By Order Serial No. E-3183, the Board instituted an investigation with reference to many of the liability rules in various tariffs. As to Northwest, its counsel in that proceeding stipulated with Bureau counsel to change certain of the tariff rules. The personal injury rules (parts of 14 and 17 of Charles C. Hubbard's Tariff C. A. B. No. 27) were eliminated and various modifications were made with reference to baggage claims, the amounts of limitation, time for claims, time for suits, etc. By Order No. E-7348, dated May 1, 1953 (Docket No. 4059, et al.), the Board approved the stipulation and dismissed the matter with respect to Northwest Airlines, Inc.

So far as present day aviation is concerned, the problem concerning Northwest Airlines' tariff provision in 1947, and similar provisions of other American airlines, has long since been laid to rest. With the foregoing historical mat-

ters well known to the petitioner's counsel, Judge Learned Hand wrote:

> "* * * Judgment was entered in June 1951 and neither at the hearing before the judge nor after the opinion or judgment was filed did she ask leave to present to the Board the invalidity of the regulation, so that the only question upon this appeal is whether it was to be deemed valid until the Board declared that it was not."

The effect of the adjudication is simply this: The District Court and the Court of Appeals for the Second Circuit have said, in effect, to the petitioner—you alleged the carrier's tariff requiring you to bring your action within one year is unreasonable. The issue of time for suit was tendered by the carriers more than six years ago. Under Act of Congress (49 U. S. C. 642) the Civil Aeronautics Board has been given the power and authority to hear your grievance. You have refused to present it there, where the law says it should be. We will simply apply the rule of law promulgated by the Supreme Court of the United States that, under such circumstances, a tariff provision is deemed valid. The law has given you the right to an adjudication of your problem before the Board. You have chosen not to follow the law and you cannot expect us, the Judiciary, to violate the law and take on the role of the Civil Aeronautics Board, to which the statute has clearly given this function of determining "reasonableness."

The statute itself, in the clearest language, requires the adjudication which has actually been made. 49 U. S. C. 642(a)(d)(g) gives to the Board the authority, either upon its own initiative or upon the complaint of any person, and after notice and hearing, to decide whether any classification, rule, regulation, practice, rate, fare, or charge is unjust, or unreasonable, or unjustly discriminatory, or unduly preferential, or prejudicial. Upon so finding, the

statute gives power to the Board to determine and prescribe lawful rates, fares, charges, classifications, rules, regulations and practices. The Board not only has authority to conduct a hearing upon any new tariff filed with it, but it has the power to suspend the operation of a tariff pending its decision. Where the legality and reasonableness of a tariff are involved, the doctrine of "primary jurisdiction" is obviously to be applied.

While the petitioner seeks to give the matter some Constitutional feigned implications by the most patently untenable argument about the judiciary usurping the legislative functions (Petition, pp. 9-19), *the petition actually admits that what the Courts below have adjudged is entirely in accord with the statutes.* Says the petitioner, "Primary jurisdiction to determine the effect of tariff regulations filed with the Civil Aeronautics Board rests with the Board pursuant to the Civil Aeronautics Act of 1938" (Petition, p. 9). And, again, "The Civil Aeronautics Board has the primary jurisdiction to determine and prescribe the lawfulness and reasonableness of an arbitrarily filed airline tariff" (Petition, p. 10). The doctrine of "primary jurisdiction" (which the petitioner urges is proper) is apparently assigned as the first ground for review here, while, in fact, *that very doctrine is the exact basis of the decisions in both Courts below.* Among the cases cited in footnote 14 of the petition, are *Lichten* v. *Eastern Airlines, Inc.,* 189 F. 2d 939 and *Civil Aeronautics Board* v. *Modern Air Transport Inc.,* 179 F. 2d 622, both decided by the Court of Appeals for the Second Circuit. The basic principle therein enunciated has been applied by that same Court in this case.

What, then, is the petitioner's *actual* position? It is that the Courts have not done what they cannot do and what the petitioner, herself, should have done in 1949, assuming there ever was any sincerity to her protestations. The grievance is that the Courts below have failed to

refer the matter to the Civil Aeronautics Board. The issue of time for suit under the tariff has been involved in this case for more than six years (fols. 2, 22). If the petitioner felt aggrieved by the tariff, it was *her* right under the statute to present the matter to the Civil Aeronautics Board. The reason that was never done is fairly apparent because with a claim so suspicious as this, the petitioner never expected the Board would upset a course of practice going back to 1938, especially where the tariff provisions are now of no interest to anyone other than the parties to this suit.

Where does any District Court derive a power "to refer the matter to the Civil Aeronautics Board for determination?" There is obviously no power or duty in any Court to compel the Civil Aeronautics Board to entertain and investigate a *nonexistent* complaint. The procedure under the statute is well known to the petitioner's attorney. Where a litigant is met with the defense of a tariff provision, which is thought to be unreasonable, the litigant simply files a complaint with the Board. If the carrier makes any affirmative gesture involving the tariff provision in the law suit while the complaint is pending and undecided before the Board, a simple request is made to the Court where the law suit is at issue to withhold decision awaiting the outcome of the Board's adjudication. That is what was done in the *Battista* matter.

The petitioner's attorney had no reason to expect the Board would invalidate an air carrier's tariff provision for suit within one year (and this in a case of an unwitnessed, unreported, unheard of "accident" in-flight) especially since Congress had legislated that a provision for suit within one year was perfectly reasonable under any circumstance for ocean carriers. (46 U. S. C. 1303). So he glibly places the burden for the failure to present the problem to the Board upon the Courts instead of upon himself.

The effect of applying the rule of "primary jurisdiction" to the case at Bar is exactly the opposite to that which the Petitioner infers. Assertedly, there has thus been "undue invasion by the district court in the field of legislation and legislative authority" (Petition, p. 19). Actually, the Courts have applied the law as Congress enacted it and have effectuated the legislative desire that matters of this character be determined initially by the Board. 49 U. S. C. 642 (a) (d) (g). The Court of Appeals wrote here:

> "* * * Assuming for argument that no regulation ought to be allowed to relieve the carrier of its duty (of care for a passenger), there is every reason for allowing the Board to pass upon the adequacy of the time for suit."

According to the petition, it is alleged that the sole reason for granting a writ of certiorari is that the "courts below (have offended) Article I, Section 1, of the Constitution of the United States, conferring upon Congress exclusive powers to enact law" (petition, p. 8). The simplest answer to such an assertion is that the Courts here have legislated nothing. They have simply followed the statute as it has been written and have held, in effect, that for over six years the petitioner has had every right and opportunity to present the question to the Civil Aeronautics Board and has refused to do so. The statute gives the fundamental power and authority to hear this grievance to the Civil Aeronautics Board, and since the petitioner has refused to present her complaint there, the Courts have presumed the old tariff to have been valid, there being no contrary adjudication by the Civil Aeronautics Board. To detract from the power of that Board in a factual situation such as that presented here, would be doing a disservice not only to the Board, but, perhaps, even to the petitioner, since one day there must come an end to this stale and unmeritorious claim.

CONCLUSION

In view of the foregoing, a writ of certiorari should not be issued.

Respectfully submitted,

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HAROLD B. WILLEY, Cl

Supreme Court of the United States

October Term, 1955

No. 290

ANITA HERMAN,

Petitioner,

v.

NORTHWEST AIRLINES, INC., and CAPITAL AIRLINES, INC.,

Respondents.

PETITIONER'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents have attempted to persuade this Honorable Court that this petition for writ of certiorari should not be granted, on the ground of lack of public interest in this controversy.

Respondents have misconstrued the basis of this petition.

The question of whether a private corporation may arbitrarily "legislate" a defense to its negligent acts, under the guise of compliance with a regulation, is of vital concern to the general citizenry as a deprivation of the constitutional guarantee of due process of law.

Respectfully submitted,

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on the Brief.